U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-P-&A-, INC.

DATE: FEB. 4, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a naval architecture company, seeks to permanently employ the beneficiary in the United States as a mechanical engineer under the immigrant classification of advanced degree professional. *See* Immigration and Nationality Act (the Act) § 203(b)(2), 8 U.S.C. § 1153(b)(2). The Director, Nebraska Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Petitioner filed the instant Form I-140 petition, along with supporting documentation, on December 31, 2014. As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was filed with the U.S. Department of Labor (DOL) on July 24, 2014, and certified by the DOL (labor certification) on December 18, 2014. To be eligible for approval, the Petitioner must establish its continuing ability to pay the proffered wage of the job offered from the priority date up to the present.[1] *See* 8 C.F.R. § 204.5(g)(2). The priority date of the instant petition is July 24, 2014. In addition, the Beneficiary must have all the education, training, and experience specified on the labor certification as of the priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg'l Comm'r 1977).

On January 28, 2015, the Director sent the Petitioner a Request for Evidence (RFE). The Petitioner was requested to submit additional evidence of its ability to pay the proffered wage of the instant Beneficiary as well as the beneficiaries of its other I-140 petitions (I-140 beneficiaries). The Petitioner responded to the RFE in April 2015 by submitting some, but not all, of the evidence requested.

On April 30, 2015, the petition was denied by the Director on the ground that the Petitioner did not establish its ability to pay the proffered wages of the instant Beneficiary and its other I-140 beneficiaries. The evidence of record – which included copies of the Beneficiary's Form W-2, Wage and Tax Statement, for 2014 and payment records to the Beneficiary until April 2015 – showed that the instant Beneficiary, who began working for the Petitioner in 2011, was paid less than the proffered wage in 2014 and the early months of 2015. The record did not include the

[1] The priority date of an immigrant petition is the date the underlying labor certification application was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

Petitioner's federal income tax return for 2014 at the time the Director's decision was issued,[2] so it was not possible based on tax records to show that the Petitioner's net income or net current assets were sufficient in 2014 to cover the balance of the instant Beneficiary's proffered wage that year. As for the other I-140 beneficiaries, the Director noted that crucial evidence requested in the RFE – including their W-2 forms or pay stubs – was not provided. Nor did the Petitioner specifically identify its other I-140 petitions and their beneficiaries, as requested in the RFE. Thus, it was not possible to determine the extent of the Petitioner's wage obligations and payments to its other I-140 beneficiaries. In the denial decision the Director pointed out that the Petitioner bore the burden of proof in this proceeding, citing section 291 of the Act, and that the Petitioner had not met its burden.

The Petitioner filed a timely appeal, which was supplemented by a brief from counsel and supporting documentation. We conduct appellate review on a *de novo* basis. *See Soltane v. Department of Justice*, 381 F.3d 143, 145 (3d Cir. 2004).

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part, as follows:

> Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Thus, the Petitioner must establish its continuing ability to pay the proffered wage of the job offered from the priority date (July 24, 2014) up to the present. Furthermore, the Petitioner must establish its ability to pay the proffered wages of every other beneficiary of an I-140 petition that was pending or approved from July 24, 2014 onward. A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977).

In determining the petitioner's ability to pay the proffered wage, U.S. Citizenship and Immigration Services (USCIS) first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence is considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

[2] On April 22, 2015, as part of its response to the Director's RFE, the Petitioner submitted a copy of a Form 7004, Application for Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns.

In this case, the record shows that the Beneficiary has been employed by the Petitioner since before the priority date. The proffered wage of the job offered, as stated in Part G of the ETA Form 9089, is $84,937 per year. The Beneficiary's Form W-2 for 2014 shows that he received "wages, tips, other compensation" of $73,402.95, which was $11,534.05 less than the proffered wage in 2014. The Beneficiary's payment history from January to April 2015 shows that he was receiving gross pay on a bimonthly basis of $3,240.25. Allocated over the entire year the Beneficiary's 24 payments would total $77,766.00 in 2015, which is $7,171 less than the proffered wage. Thus, the Petitioner has not established its ability to pay the proffered wage based on the compensation actually paid to the Beneficiary from the priority date onward.

As explained by the Director in the denial decision, if the petitioner does not establish that it has paid the beneficiary an amount at least equal to the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures entered on the petitioner's federal income tax return(s). If either of these figures equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would be considered able to pay the proffered wage during that year. There is ample judicial precedent for determining a petitioner's ability to pay the proffered wage based on its federal income tax returns. *See e.g. Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Togatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)).

As previously discussed, the record contained no federal income tax return for 2014 at the time the Director's decision was issued on April 30, 2015. The Petitioner submitted a Form 7004 as part of its response to the Director's RFE on April 22, 2015, thereby suggesting that it had not yet filed its federal income tax return for 2014 by that date. On appeal the petitioner has submitted page one of its Form 1120S, U.S. Income Tax Return for an S Corporation, for 2014. The form is signed by [redacted] Washington, and dated April 13, 2015, which was prior to the date the Petitioner responded to the Director's RFE and submitted the Form 7004. The Petitioner has not explained why it did not submit its Form 1120S, instead of Form 7004, when it responded to the Director's RFE on April 22, 2015.

It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's evidence also reflects on the reliability of the applicant's remaining evidence. *See id.*

In considering the partial Form 1120S submitted by the Petitioner for 2014, we note that the entry for ordinary business income (or loss) on line 21 of page 1 is $81,317. If an S corporation's income is exclusively from a trade or business, USCIS considers its net income to be the figure for ordinary income on page 1, line 21. However, if there are relevant entries for additional income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation's net income will be found at the end of

Schedule K. Since the Petitioner has not submitted Schedule K, or any other pages of its 2014 Form 1120S after page 1, we cannot determine exactly what the Petitioner's net income was in 2014.[3] Furthermore, the lack of a complete Form 1120S for 2014 means that we cannot determine the Petitioner's net current assets, which are reflected on Schedule L. Net current assets are the difference between the Petitioner's current assets, entered on lines 1-6 of Schedule L, and its current liabilities, entered on lines 16-18 of Schedule L. Based on the evidence of record, therefore, the Petitioner has not established its ability to pay the proffered wage based on its net income or its net current assets from the priority date onward.

In the appeal brief the Petitioner indicates once again, as it had in responding to the Director's RFE, that it declined to provide the W-2 forms or pay stubs of its other I-140 beneficiaries. The Petitioner has not identified its other I-140 beneficiaries specifically, nor provided their priority dates and proffered wages, nor advised us as to their current immigration status. Thus, the Petitioner has not established its ability to pay the proffered wages of those I-140 beneficiaries, which raises additional doubts about whether the job offered to the instant Beneficiary is realistic. *See Matter of Great Wall, supra.* As provided in the regulation at 8 C.F.R. § 103.2(b)(14): "Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the benefit request."

USCIS may consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612.[4] USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

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[3] The record includes the Petitioner's Form 1120S for 2013 (before the priority date in this proceeding), which shows that the Petitioner had additional income, deductions, and other items listed on Schedule K which resulted in a figure for "income/loss reconciliation" on line 18 of the Schedule K (-$202,124) which differed from the figure for "ordinary business income (loss)" on line 21 of page 1 (-$201,619).

[4] The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In this case, the Petitioner states that it has been in business since 1979, but has provided little evidence of its operations prior to the filing of the instant petition in July 2014. The Petitioner claimed on its I-140 petition in July 2014 to have 52 employees, though only 40 were listed on the Quarterly Wage Detail Report (Form 5208B) to the State of Washington for the quarter ending on June 30, 2014, and only 38 on the Form 5208B for the quarter ending on September 30, 2014. In the appeal brief the Petitioner cites its "ordinary income" of $81,317 in 2014 (entered on page 1, line 21 of its Form 1120S) as evidence of a strong financial position. As previously discussed, however, the rest of the Petitioner's 2014 Form 1120S has not been submitted. It is not possible to draw any firm conclusion about the Petitioner's financial strength in 2014 based on one page of its federal income tax return. Moreover, the Petitioner's Form 1120S for the preceding year, 2013, shows that the Petitioner had no net income at all that year, but rather a net loss of more than $200,000. The 2013 tax return did record net current assets (in the form of cash) of $94,723 at year's end, and $472,832 at the beginning of the year. But there is no other evidence in the record of the Petitioner's financial or business history before then. Considering the insufficient documentation from the Petitioner and the lack of information about the other I-140 beneficiaries, we determine that the Petitioner has not established that the totality of its circumstances, as in *Sonegawa*, demonstrates its continuing ability to pay the proffered wage of the instant Beneficiary, as well as those of its other I-140 beneficiaries, from the priority date of the instant petition up to the present.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. *See* section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

For all of the reasons discussed herein, we affirm the Director's decision to deny the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of G-P-&A-, Inc.*, ID# 15675 (AAO Feb. 4, 2016)